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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1456

CINDY A. BAKER, et al.,

Petitioners,

v.

ELCONA HOMES CORPORATION, et al.,

Respondents.

On Joint Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the judgment on the jury verdict from the United States District Court for the Northern District of Ohio, is set forth in petitioners' Appendix A.

Judgment orders of the United States District Court for the Northern District of Ohio are set forth as petitioners' Appendices B, C, and D.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the question presented for review is worthy of certiorari consideration by this Court, where Petitioners seek merely to contest the Sixth Circuit's construction and application of one of the Federal Rules of Evidence and where the question is limited to the particular evidence and specific facts of this diversity negligence case?

2. Whether the term "factual findings" as used in Rule 803(8) of the Federal Rules of Evidence encompasses the evaluative report prepared by an Ohio State Highway Patrol accident investigation and reconstruction expert, where such investigation was authorized and required by statute and where such expert was subject to unlimited cross-examination as to his evaluation and findings as contained in such report and to which he referred throughout his direct testimony?

FEDERAL RULE OF EVIDENCE INVOLVED

This case involves Rule 803(8) of the Federal Rules of Evidence, which states, in

pertinent part, that the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report,... or (C) in civil actions..., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

COUNTER-STATEMENT OF THE CASE

Early in the evening of June 7, 1973, a 1968 Plymouth Valiant automobile traveling southbound on State Route 4 and a Ford semi-tractor truck traveling westbound on U. S. Route 20 collided at their intersection in Huron County, Ohio. All the occupants of the two vehicles were killed or injured. The case involves exclusively circumstantial evidence as to which vehicle had the green light at the intersection. Upon the ultimate issue, the jury found in favor of the respondent-truck driver, Joseph Slabach, and his employer, Elcona Homes Corporation.

U. S. Route 20 was a four-lane divided highway and State Route 4 a two-lane country road. Electronic sensors controlled

the traffic signal sequence and gave Route 20 traffic a constant green light on the major thoroughfare (on which the respondent-truck driver was traveling) until the Route 4 sensor was tripped by approaching traffic. Because there was no eye-witness testimony as to which vehicle crossed the sensor on its road first, the determinative signal color at the time of the collision was the subject of conflicting circumstantial evidence and argument from allowable inferences.

Petitioners offered proof in their case from a hired accident reconstruction expert. He gave his expert opinion, based on a theory incorporating elapsed time estimates of another driver who went through the intersection just before the accident, that petitioners' vehicle had the green light when it reached the intersection. Respondent-truck driver testified, just as he had reported immediately following the accident, that he observed petitioners' car equidistant with his from the intersection before the collision and that both vehicles were traveling at approximately the same road speed prior to the impact.

Respondents called in their case the investigating Ohio State Highway Patrolman, Sgt. John Hendrickson. Petitioners had subpoenaed him duces tecum, but had not called him to testify, so respondents called him as a witness although they had no knowledge then of the most important of his factual findings, mathematical calculations from vector analyses.

Sgt. Hendrickson, a veteran of twenty-eight years with the Ohio State Highway

Patrol, had supervised the accident investigation and preparation of an extensive police accident report (comprising more than nine handwritten pages plus detailed vector analysis diagrams with overlays of the vehicles' speeds solely from the physical evidence). He was qualified by experience as an accident reconstruction expert, as held below. The Sixth Circuit decision hereinbelow noted (page 7 of Appendix A to the Petition, renumbered as page 37 of the Petition) that he conducted his investigation pursuant to Ohio statute. He testified at length about the physical circumstances of the accident scene, skid marks left by the vehicles and measurements of the distances traveled by each after the impact. On the basis of such physical data, which he reviewed in his testimony, he had made the preliminary finding in his written report that "Apparently [the Valiant] entered the intersection against a red light." This petition asserts that these few lines, plus some checked boxes, in the middle of a voluminous report merit review on certiorari by this Court.

In the course of Sgt. Hendrickson's direct testimony, when he produced his accident investigation files, the trial court conducted an in camera examination of his reports, with counsel, on the record. Respondents gave petitioners express notice in that conference, out of the hearing of the jury, that they would offer "everything" in those reports. References to the marijuana found in the possession of the Valiant driver and to liability insurance were excised from the accident report, with counsels' participation. Before Sgt. Hendrickson began to testify

as to the contents of his reports, and before petitioners cross-examined the officer as to his investigative report, petitioners knew that respondents would offer the "official" accident report into evidence.

The magnitude of the accident caused Sgt. Hendrickson to take a special interest in its investigation, according to his testimony, and he therefore proceeded to prove the preliminary conclusions stated in his report through his subsequent vector analysis. He testified at trial in a capacity truly independent of the interests of either side of the litigation, unlike the obvious partiality of petitioners' hired expert who had already testified at trial to a contrary opinion as to who had the red light at the intersection.

The cross-examination of Sgt. Hendrickson by petitioners extended over two trial days, so that they had a full and fair opportunity, not only for cross-examination regarding any aspect of his official report, but also for calm reflection upon the most effective cross-examination techniques. Petitioners did cross-examine the police sergeant about portions of his report, as he sat with it in his hands for ready reference, but they chose as a matter of trial tactics to ignore, in the jury's presence, the report statement now contested, until after the adverse jury verdict. Petitioners did object to this and many other evidentiary rulings of the trial court, which the Sixth Circuit painstakingly analyzed seriatim.

Petitioners do not now contest the admissibility of the report's statements that both vehicles approached the intersection "apparently at road speeds" or that "the light would not have had time to change" to favor petitioners, or the admissibility of Sgt. Hendrickson's drawn-to-scale vector analysis diagrams, which independently support his contested written statement as to which vehicle entered the intersection against the light.

There were numerous factual issues between the parties, primarily as to the surrounding physical circumstances, relative vehicle speeds, elapsed time estimates, sight obstructions and light timing sequence and status just before the time of the collision, all bearing on the determinative question of the color of the light when the vehicles collided. The credibility of the lay and expert witnesses was for the jury's consideration. Pursuant to a special stipulation of the parties upon the record, a unanimous jury verdict was agreed upon and was then returned in favor of respondents.

Upon extensive motions by petitioners for a new trial and for judgment notwithstanding the verdict in the trial court, the District Judge who conducted the trial overruled the motions, concluding "that the evidence is as complete as can be produced and amply supports the jury verdict." See Appendix B to the Petition herein.

Petitioners then obtained, as a matter of right, a conscientious and scrupulous analysis by the United States Court of Appeals for the Sixth Circuit, in sixteen

pages of scholarly detail, reviewing this and numerous other evidentiary questions, ranging from their motion for directed verdict to other testimony to the trial court's charge to the manifest weight of the evidence.

As the petition correctly states at page 12, the Court of Appeals found that the official accident report was properly admitted under Federal Rule of Evidence 803(8); its decision was not further restricted to relying exclusively upon F.R.E. 803(8)(C), which is the only question presented for review by petitioners. The Sixth Circuit actually relied alternatively upon Rule 803(8)(B) and/or 803(8)(C) and analyzed each subsection in detail, just as it reviewed each of the numerous other issues on appeal separately.

ARGUMENT

I.

The Petition's Question Is Not Worthy Of The Certiorari Jurisdiction Of This Court

The jurisdictional grant invoked in this petition "to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the... circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923). In contradistinction, these petitioners do not even claim any

conflict among the circuits or elsewhere. Granting this petition merely to construe conclusively two words in one of the sixty-two Federal Rules of Evidence will not decide a broad question of importance in the public interest. It will only allow petitioners, disappointed below by an adverse jury verdict and a unanimous affirmance thereof in the Court of Appeals, another opportunity to cross-examine this highway patrolman about his accident report, under the particular and peculiar circumstances of this case. "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Id.

The extremely limited factual and evidentiary circumstances of the petition's question are apparent from its statement in the petition, encumbered with its extensive qualifying clauses. Respondents have expanded upon the circumstances of the evidentiary question in this Brief in Opposition to point out some other aspects of trial dynamics within which the issue was decided below. As stated in United States v. Johnston, 268 U.S. 220, 227 (1925), the United States Supreme Court does "not grant a certiorari to review evidence and discuss specific facts." This petition only presents a relatively minor question drawn from an extensive appellate analysis of numerous evidentiary issues. Petitioners have little left at this ultimate level to quibble about. A grant of certiorari herein will allow this Court to review only a miniscule part of the evidence of this case, which the Court of Appeals for the Sixth Circuit has already

dissected, with care, caution, and concern for the interests of all parties.

The considerations governing review upon a petition for such a writ, in Rule 19 of the Rules of the Supreme Court of the United States, have been totally ignored by petitioners because the question presented for review lacks any indicia of the requisite "character" for serious consideration. Even if the question presented would pose an intellectually interesting problem, "... this Court does not sit to satisfy a scholarly interest in such issues." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). The severely limited precedential value of the petition's question cannot extend beyond these petitioners. "Nor does [this Court] sit for the benefit of the particular litigants." Id. Rule 19 speaks firmly of "special and important reasons" in order to support the granting of the writ of certiorari. Petitioners cannot present such reasons in the context of this litigation, because special and important reasons "imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Cemetery, supra at 74. This petition evidences no such broad implications.

Apt authorities abound in the volumes of this Court's decisions as to the insignificance of the petition's question. The importance of the Supreme Court's consistency in denying the writ of certiorari was emphasized in Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923), "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of

the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Since that was written, the Court's considerations have continued constant and the conclusion here is identical. "The present case certainly comes under neither head." Id.

This petition neither presents special nor important questions of broad precedential or public interest, nor claims any conflict with any other decision. It seeks merely reconsideration of the correctness of the consistent decisions below, limited to the particular evidence and specific facts of this diversity negligence case. It is not worthy of the certiorari jurisdiction of this Court.

II.

The Evidentiary Rulings Below Were Correct

Respondents' counter-statement of the case recites the particular trial circumstances surrounding the evidentiary question presented for review. It reviews the manner in which the independent accident investigation and reconstruction expert, Sgt. John Hendrickson of the Ohio State Highway Patrol, testified with his official accident report in his hands and explained to the jury how his later vector diagram analysis confirmed his preliminary factual findings stated in the report. Respondents' counter-statement relates the basis on which petitioners might have exercised their unfettered opportunity to cross-examine this witness

on any part of this accident report, if they had chosen more dangerous trial tactics. It refers to the officer's investigation having been conducted under the authority of and duty imposed by Ohio statute. The counter-statement explains how petitioners knew, before their cross-examination, that respondents would offer the report, just as they knew that their own hired expert had already testified to a contrary opinion upon a different theory. For the reasons given hereinafter, the evidentiary rulings in the courts below were correct.

A. The Question Presented Is Not Dispositive Of This Case, Where The Sixth Circuit Found The Trial Court's Ruling Correct Under Federal Rule Of Evidence 803(8)(B) Or (C)

The Sixth Circuit Court of Appeals considered whether the accident report and its addenda were admissible under Federal Rule of Evidence 803(5) as recorded recollection, as the trial court found, but concluded, "however, that the report was more properly admissible as a public record under Fed. R. Evid. 803(8)." Appendix A to the Petition, pages 5 - 6 thereof, renumbered as pages 35 - 36 of the Petition. After quoting Federal Rule of Evidence 803(8), the Sixth Circuit expressly found that observations and data in the police report satisfied Rule 803(8)(B). Pages 6 - 7 of Appendix A to the Petition. Because the Court of Appeals relied upon this alternative ground for the admissibility of the police report, there is no need for this Court to review the question presented under Rule 803(8) subsection (C). Because

the judgment below is supported by Rule 803(8) subsection (B), the question presented for review is not dispositive of this case.

B. The Expert Findings Of Sgt. Hendrickson Embracing An Ultimate Issue Are Expressly Allowed Under The Federal Rules Of Evidence

Petitioners imply that the police officer's findings in his official report somehow invade the province of the jury, as embracing an ultimate issue for the jury's exclusive consideration. Yet petitioners do not seriously contest his qualifications as an expert. Petitioners overlook Federal Rule of Evidence 704:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The unduly restrictive prohibition against such evidence under former practice has been removed by the Federal Rules of Evidence. Where the evidence is admissible under Rule 803(8), it may embrace an ultimate issue. Indeed, petitioners' own hired expert witness testified herein on the very same ultimate issue, with a contrary opinion. The police report's findings, admissible under Rule 803(8), were expressly allowed under Rule 704 to embrace an ultimate issue to be decided by the jury.

C. The Factual Findings Of Sgt. Hendrickson Are Admissible Under Federal Rule Of Evidence 803(8)(C) As Evaluative Reports

Petitioners posit that there is great confusion and conflict among the lower courts as to the scope of Federal Rule of Evidence 803(8)(C). They contend that this confusion and conflict necessitates clarification by this Court. However, the Sixth Circuit's examination of the legislative history of this Rule (at pages 7 - 8 of Appendix A to the Petition) shows that "factual findings" was clearly intended to include "evaluative reports."

The Court of Appeals first reviewed the House and Senate Judiciary Committees' reports (at pages 7 - 8 of Appendix A to the Petition) on this specific subject, which these parties had briefed and argued in the Sixth Circuit.

The Court of Appeals then found (at page 8 of Appendix A to the Petition) that the "Advisory Committee Notes... accept 'evaluative reports' as being within the meaning of factual findings under Rule 803 (8)(C)." Recognizing the specific admissibility of various kinds of "evaluative reports" under prior Federal statutes, these Rules continued the general liberal attitude of the courts in determining admissibility under Rule 803(8). The Sixth Circuit expressly considered the Advisory Committee Notes list of four factors relating to the report's trustworthiness (at pages 10 - 12 of Appendix A to the Petition) and specifically concluded (page 12 thereof) that "the sergeant's own objective findings of

fact... that the light was red for traffic [in petitioners' car] was admissible." Petitioners' objections were correctly determined to go "not so much to admissibility as to weight and credibility." Page 12 of Appendix A. The accident report was corroborated by the cross-examination of these petitioners. The Sixth Circuit found (page 12 of Appendix A) "no showing that [petitioners'] right of cross-examination was restricted in any way. That they did not choose to [directly attack its findings] was no doubt a matter of proper trial strategy but cannot affect the admissibility of the report in the first place."

Finally, the only two decisions cited in the petition as evidence of its contentions concerning confusion and conflict in the lower courts were each reviewed by the Sixth Circuit below, as supporting its decision. Petitioners consider Melville v. American Home Assurance Co., 443 F.Supp. 1064 (E.D. Pa. 1977), in which an FAA Airworthiness Directive was admitted as a "factual finding" under Rule 803(8)(C) to be distinguishable because the FAA's "corresponding technical expertise" (Petition, page 23) is far removed from that of this police officer. An airworthiness directive is an FAA report, issued pursuant to statute (49 U.S.C.A. Sections 1421, 1423) to the effect that an "unsafe condition exists in a product" and "is likely to exist or develop in other products of the same type design." 14 C.F.R. Section 39.1 (1977). An airworthiness directive is an official government evaluative report which directs corrective action where the FAA concludes that an unsafe product condition exists in a particular aircraft or component,

admittedly based on FAA technical expertise. Admission of the airworthiness directives in Melville is distinguishable, actually, from the instant petition primarily in that no FAA representative was required to testify in Melville in order to make those official reports admissible. As to the "technical expertise" of Sgt. Hendrickson, the Sixth Circuit found that "his expertise and skill in accident reconstruction do not appear seriously to have been challenged.... [It was] apparent that he possessed special skill and experience in the investigation of automobile accidents" (page 11 of Appendix A to the Petition). Both of the courts hereinbelow have recognized his "technical expertise" in the field of auto accident investigation and reconstruction, qualifying as admissible his official evaluative findings as to the apparent cause of this collision. His official investigation and report, like that of the FAA, was both authorized and required by statute. The analogy with Melville is complete: an evaluative government report resulting from an investigation authorized and required by law is a "factual finding" under Rule 803(8)(C).

Similarly, in United States v. School District of Ferndale, 577 F.2d 1339 (6th Cir. 1978), this same Court of Appeals ruled that findings of an HEW hearing examiner, that a school had been established and maintained for segregatory purposes (obviously an evaluative report reaching expert conclusions after marshaling relevant facts) constituted "factual findings" admissible into evidence under Rule 803(8)(C). No conflict or confusion

exists, contrary to the petitioners' argument, as to the universal conceptual application of the term "factual findings" in Rule 803(8)(C) to include evaluative reports, beginning with the rule's legislative history and continuing through the uniform analysis in each of the noted cases which has examined the question.

This Court, in a footnote in Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976) recognized the admissibility in evidence at trial de novo, under Federal Rule of Evidence 803(8)(C), of prior administrative findings in an employment discrimination claim. Curiously, the petition does not mention this recent recognition by this Court that, on the authority of this specific Rule, EEOC findings of "no reasonable cause" are "admissible as evidence at a federal-sector trial de novo." Id. Despite petitioners' omission, such an EEOC "evaluative report," obviously containing an expert opinion and conclusion as to causation, implicitly indicates this Court's position that such reports constitute "factual findings" under Rule 803(8)(C). Alternatively, this petition's question merits no more attention than the fitting footnote already accorded it in Chandler, supra.

For all the above reasons, the factual findings of Sgt. Hendrickson's accident report are admissible under Federal Rule of Evidence 803(8)(C) as official evaluative reports of an impartial and qualified expert whose investigation was both authorized and required by statute, and whose trustworthiness was unimpeachable.

CONCLUSION

Respondents, Joseph Slabach and Elcona Homes Corporation, respectfully oppose the petition for a writ of certiorari and request that the petition be denied.

Respectfully submitted,

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